No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AEROFLOT-RUSSIAN AIRLINES,

Petitioner,

—v.—

MGM PRODUCTIONS GROUP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a U.S. court should defer to a foreign arbitral panel in determining whether the panel's award is contrary to U.S. public policy within the meaning of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

2. Whether an arbitral award ordering payment under a contract that violates U.S. sanctions laws restricting trade with Iran is contrary to U.S. public policy within the meaning of the New York Convention.

PARTIES AND CORPORATE DISCLOSURE

All parties to the proceedings in the courts below are named in the caption of the case.

Petitioner Joint Stock Company Aeroflot-Russian Airlines has no parent corporation, and no publicly held corporation owns 10% or more of its stock. Petitioner is majority owned by the Government of Russia. The inclusion of this disclosure statement is not and should not be construed as an admission that petitioner is a nongovernmental corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES AND CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

TREATIES, STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE 2

A. The Contract Between Aeroflot and Russo 2

B. The Iranian Transactions Regulations 3

C. The Arbitration 4

D. The Proceedings in the Courts Below 4

REASONS FOR GRANTING THE WRIT 6

The Deference, If Any, That a U.S. Court Owes to Foreign Arbitrators in Determining Whether Their Award Violates U.S. Public Policy Presents an Important Question of Federal Law That Has Not Been, But Should Be, Settled by This Court. 6

A. This Court's Cases Make Clear That Private Arbitrators Owe No Duty to Safeguard the Public Interest 8

B. The Decision Below Is Contrary to the Language of the New York Convention and the Practice of the Other Contracting States. 12

C. The Decision Below Confuses Laws Designed to Protect the Parties with Laws Designed to Protect the Interests of the State. 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Antco Shipping Co. v. Sidermar S.p.A., 417 F. Supp. 207 (S.D.N.Y. 1976) 13

Banco de Seguros del Estado v. Mutual Marine Office, Inc., 344 F.3d 255 (2d Cir. 2003) 7

Eastern Associated Coal Corp. v. United Mine Workers, District 17, 531 U.S. 57 (2000) 11, 16

Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310 (2d Cir. 1998) 5, 7, 9, 15

Harris Adacom Corp. v. Perkom Sdn Bhd, [1994] 3 Malayan L.J. 506 (Kuala Lumpur High Court Dec. 10, 1993) (Malaysia), *excerpted in* 22 Y.B. Commercial Arb. 753 13

Hurd v. Hodge, 334 U.S. 24 (1948) 7

Judgment of May 11, 1983, 1983 Österreichische Juristenzeitung 519 (Oberster Gerichtshof [Supreme Court]) (Austria), *excerpted in* 10 Y.B. Commercial Arb. 421 13

Kashani v. Tsann Kuen China Enterprise Co., 118 Cal. App. 4th 531, 13 Cal. Rptr. 3d 174 (2d Dist. 2004) 7, 9, 13

Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198 (1918) 14

McMullen v. Hoffman, 174 U.S. 639 (1899) 7

National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800 (D. Del. 1990) 13

National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240 (2d Cir. 1991) 7, 16

Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974) ..... *passim*

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) 11

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 12

Soleimany v. Soleimany, [1999] Q.B. 785 (C.A. 1998) (Eng.) 13

United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29 (1987) 7, 8, 11

Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995) 9

W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers, 461 U.S. 757 (1983) 7, 8, 10

Statutes, Treaties, Regulations and Presidential Documents

28 U.S.C. § 1254(1) 1

Continuation of the National Emergency with Respect to Iran, 69 Fed. Reg. 12,051 (Mar. 10, 2004) 10

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (done at New York 1958; ratified by United States 1970) .... *passim*

International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 ..... 2, 3

50 U.S.C. § 1705 4

Iranian Transactions Regulations,
31 C.F.R. §§ 560.101-560.901 ..... *passim*
31 C.F.R. §§ 560.201, 560.204 (1996 ed.) 10
31 C.F.R. § 560.206 ..... 3, 11, 15
31 C.F.R. § 560.206 (1996 ed.) 3, 10
31 C.F.R. § 560.208 ..... 3, 11
31 C.F.R. § 560.306(a)(3) (1996 ed.) 3, 10
31 C.F.R. § 560.314 15
31 C.F.R. § 560.515 4

Message to Congress on Iran, 31 Weekly Comp. Pres. Doc. 1584 (Sept. 25, 1995) 4

Periodic Report on the National Emergency with Respect to Iran, H.R. Doc. No. 108-47 (Mar. 13, 2003) 16

Other Authorities

International Law Association Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, in International Law Association, *Report of the Seventieth Conference Held in New Delhi* (2002) 14

International Law Association Committee on International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, in International Law Association, *Report of the Sixty-Ninth Conference Held in London* (2000) 14

Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 Arb. Int'l 274 (1986) 9

PETITION FOR A WRIT OF CERTIORARI

Petitioner Aeroflot-Russian Airlines ("Aeroflot") respectfully requests that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on February 9, 2004.

OPINIONS BELOW

The opinion of the District Court is unreported, and is available at 2003 U.S. Dist. LEXIS 8174 and at 2003 WL 21108367. The opinion of the Court of Appeals is reported at 91 Fed. Appx. 716. The other orders in the case are unreported.

JURISDICTION

The Court of Appeals entered judgment on February 9, 2004. Aeroflot filed a timely petition for rehearing on February 23, 2004. The Court of Appeals denied rehearing on April 28, 2004. This petition has been filed within 90 days of that ruling. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATIES, STATUTES AND REGULATIONS

This case involves Article V(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (the "New York Convention"), which provides in pertinent part as follows:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that ... (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

This case also involves the U.S. Treasury Department's Iranian Transactions Regulations, 31 C.F.R. §§ 560.101-560.901, and the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, relevant excerpts from which are reproduced in the appendix at 18a-19a.

STATEMENT OF THE CASE

A. The Contract Between Aeroflot and Russo

In 1992, Aeroflot-Soviet Airlines, the predecessor in interest of petitioner Aeroflot-Russian Airlines (together with its predecessors, "Aeroflot"), entered into a Consultation Agreement with Russo International Management, Inc., the predecessor in interest of respondent MGM Productions Group, Inc. (together with its predecessors, "Russo"), relating to the leasing of aircraft to Iran. 21a-26a. Under the Consultation Agreement, Russo agreed to "be Consultant to [Aeroflot] in connection with any Contract relating to Iran Air or aircraft (but excluding helicopters) in Iran." 24a. According to Russo's testimony and the findings of the arbitrators in this matter, Russo—a New York corporation[1]—performed extensive consultation services with respect to the operation of Russian aircraft in Iran through 1996, including negotiating and drafting leases between Aeroflot and Iranian airlines, arranging for aircraft maintenance in Iran, and the like. 27a, 31a-34a.

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[1] Russo International Management, Inc., and its immediate successor Russo International Venture, Inc., were New York corporations. MGM Productions Group, Inc., is a California corporation formed by Russo's principal after the arbitral award was entered, and is the assignee of Russo International Venture, Inc.'s interest in the award.

B. The Iranian Transactions Regulations

In 1987, 1995 and 1997, pursuant to statutory authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706, Presidents Reagan and Clinton issued four executive orders imposing sanctions against Iran. At the President's direction, the Office of Foreign Assets Control of the Department of the Treasury ("OFAC") has adopted the Iranian Transactions Regulations ("ITRs"), 31 C.F.R. §§ 560.101-560.901, to implement these Executive Orders. Under the Executive Orders and the ITRs, "United States persons" such as Russo are prohibited from engaging in a wide range of transactions in goods or services that directly or indirectly involve the Government of Iran or the territory of Iran. Among other things, the ITRs prohibit any "United States person," such as Russo, from engaging in any transaction "related to" services of Iranian origin.[2]

The broad prohibitions contained in the ITRs manifest the President's assessment of the nation's interest in sanctioning

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[2] The ITRs as adopted in 1995 barred any "United States person" from, among other things, engaging in "any transaction ... *relating to* ... services of Iranian origin," which were defined to include "[s]ervices performed in Iran or by the Government of Iran." 31 C.F.R. §§ 560.206, 560.306(a)(3) (1996 ed.) (emphasis added). Effective 1997, the regulations were amended to clarify, among other things, that U.S. persons could not engage in "any transaction or dealing in or *related to* ... services of Iranian origin ... or ... [g]oods, technology, or services for ... sale or supply, *directly or indirectly*, to Iran or the Government of Iran," including but not limited to "brokering," "financing," or "facilitating" any such services, sale or supply. 31 C.F.R. § 560.206(a)(1)-(2), (b) (emphasis added); *see also id.* § 560.208 (prohibiting any U.S. person from "facilitat[ing] ... any transaction by a foreign person where the transaction by that foreign person would be prohibited by this part if performed by a United States person or within the United States").

Iran for its "support for international terrorism, efforts to undermine the Middle East peace process, and ... acquisition of weapons of mass destruction." Message to Congress on Iran, 31 Weekly Comp. Pres. Doc. 1584 (Sept. 25, 1995). Persons who violate the ITRs are subject to civil and criminal penalties. *See* 50 U.S.C. § 1705. By their express terms, the ITRs apply to pre-existing contracts such as the parties' Consultation Agreement, as well as new contracts. *See* 31 C.F.R. § 560.515.

C. The Arbitration

In 1998, Russo commenced an arbitration against Aeroflot in Stockholm, Sweden, claiming that Aeroflot had failed to make payments owed under the Consultation Agreement and breached the requirement that Aeroflot use Russo as its exclusive consultant with respect to leases of aircraft to Iran. Aeroflot's defenses included, among others, (1) that the contract had been terminated in 1995, and (2) that the contract was unenforceable because it violated the ITRs. In their final award, the arbitrators rejected Aeroflot's defenses and found that the Consultation Agreement remained in effect through November 29, 2002, the date of the award. 33a-36a. The arbitrators found that Aeroflot was responsible for paying fees to Russo through 2002, even though Russo had performed no actual services since 1996, because Russo remained "ready, willing and able" to perform. 32a-34a. The arbitral award calls for Aeroflot to pay $13,155,000 plus costs and interest. 36a-38a.

D. The Proceedings in the Courts Below

Russo assigned its interest in the arbitral award to respondent MGM Productions Group, Inc., which filed a petition to confirm the award in the United States District Court for the Southern District of New York. The District Court issued a decision and order on May 14, 2003 granting

the petition and confirming the award. 4a. In its decision, the District Court held, in a single sentence, that the arbitral award and the Consultation Agreement on which it was based did not violate the ITRs, stating:

> The Court agrees with the arbitral panel that the Agreement does not violate the Executive Orders and OFAC Regulations. (*See* Award at 41-43 (concluding that the Agreement "can not be regarded as null and void" based on "the US Regulations on Iranian Transactions" and that "Russo's consulting responsibilities ran only to Aeroflot and not to any entity in Iran.").)

11a. The District Court also stated: "Assuming arguendo that the Agreement did violate the Executive Orders and OFAC Regulations, ... a violation of United States foreign policy does not contravene public policy as contemplated in Article V of the [New York] Convention." *Id.*

Aeroflot timely appealed. On February 9, 2004, the Court of Appeals for the Second Circuit affirmed the District Court's judgment. Unlike the District Court, however, the Court of Appeals did not decide whether the ITRs were violated. As to the 1995 ITRs, the Court of Appeals deferred to the foreign arbitral panel:

> The arbitrators considered Aeroflot's argument that the Agreement violated the ITRs promulgated in 1995, and found that since the Agreement provided only for transactions between Russo and Aeroflot, it did not contravene the regulations. We accord great deference to the arbitrator's factual findings and contractual construction. *See Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 316 (2d Cir. 1998) ("[A]n arbitration award cannot be avoided

> solely on the ground that the arbitrator may have made an error of law or fact.").

2a-3a. In the alternative, the Court of Appeals held that "the Agreement cannot be said to violate fundamental public policy" because "it would be, at most, doubtful that the Agreement violated the 1995 ITRs." 3a.

The Court of Appeals also did not reach the question of whether the Consultation Agreement violated the ITRs as amended in 1997. In that regard, the Court of Appeals rejected Aeroflot's public policy defense on the ground that "Aeroflot breached the Agreement before the 1997 ITRs went into effect," and that "[w]e cannot know, therefore, whether the parties would subsequently have amended their Agreement to avoid potential violations of the regulations, were it not for Aeroflot's breach." 3a.

Aeroflot filed a timely petition for rehearing, which the Court of Appeals denied on April 28, 2004. 17a.

REASONS FOR GRANTING THE WRIT

THE DEFERENCE, IF ANY, THAT A U.S. COURT OWES TO FOREIGN ARBITRATORS IN DETERMINING WHETHER THEIR AWARD VIOLATES U.S. PUBLIC POLICY PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents the issue of whether the parties to an illegal contract can insulate the contract's illegality from full judicial scrutiny by including a provision for international arbitration. Under the reasoning of this Court's precedents, the answer to this question should be "no," but the Second Circuit and state and district courts following Second Circuit precedent have persistently reached the wrong conclusion.

A long line of this Court's decisions establishes that a contract that violates a mandatory rule of law is unenforceable. *See, e.g.*, *Hurd v. Hodge*, 334 U.S. 24, 33-34 (1948); *McMullen v. Hoffman*, 174 U.S. 639, 654-55 (1899). And under the Second Circuit's own precedent applying this rule, a contract that violates U.S. sanctions against Iran is unenforceable. *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 930 F.2d 240, 243 (2d Cir. 1991). Moreover, this Court has repeatedly held that if a contract as interpreted by the arbitrators violates positive law, the award is unenforceable. *See, e.g.*, *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42-43 (1987); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983). It follows that an arbitration award on a contract that violates the ITRs is unenforceable.

The Second Circuit, however, has adopted a starkly different rule when the public policy issue arises in the context of a *foreign* arbitration award. Second Circuit precedent establishes that an arbitral award—even under a contract that violates mandatory provisions of positive U.S. law—is enforceable in the U.S. unless the award would "violate the forum state's most basic notions of morality and justice,'" *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974), viewed in the light of whether there is "a barely colorable justification for the outcome reached" by the arbitrators, *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 260 (2d Cir. 2003).[3] The Second Circuit's

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[3] *See also Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998) (following the *Parsons* standard); *Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 554-56, 13 Cal. Rptr. 3d 174, 191-92 (2d Dist. 2004) (distinguishing the district court's

(footnote continued)

deferential approach is contrary to the reasoning of this Court's decisions, ignores the text of the New York Convention, deviates from the practice of other nations that have ratified the New York Convention, and misunderstands the origin and application of the "basic notions of morality and justice" standard.

A. This Court's Cases Make Clear That Private Arbitrators Owe No Duty to Safeguard the Public Interest.

As this Court has repeatedly recognized, arbitrators are owed no deference in determining whether their own award violates public policy. Arbitration is a creature of contract, and arbitrators are private individuals chosen pursuant to contract; they are not judges or other representatives of the state chosen to safeguard the public's interest. Thus, this Court has recognized that when an arbitral award is presented for enforcement, "the public's interests ... will go unrepresented unless the *judiciary* takes account of those interests...." *Misco*, 484 U.S. at 43 (emphasis added). For this reason, "the question of public policy is ultimately one for resolution by the courts," not the arbitrators. *Grace*, 461 U.S. at 766.[4]

(footnote continued)
opinion in this case; recognizing that the courts below fashioned a rule applicable only to arbitration under the New York Convention).

[4] The present dispute in this case relates to a pure issue of law, not the facts of the transaction or the interpretation of the contract. The contract explicitly called for Russo to provide consulting services to Aeroflot related to the leasing of Russian aircraft to Iran, and only to Iran. 21a, 23a-25a. The arbitrators explicitly found that (1) Russo had been closely involved in Aeroflot's leasing of aircraft to Iran through 1996, and (2) Russo was entitled to compensation under the contract for consulting

(footnote continued)

This Court has also recognized that the enforcing court has a meaningful role to play in reviewing whether an award comports with public policy in the international context. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (enforcing international arbitration agreement because U.S. courts "will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the ... laws has been addressed"). Indeed, it is even clearer in the international context than in the domestic context that "an arbitrator is not the guardian of the public policy of any country at all," because an international award could be enforced in a wide variety of countries having differing laws. Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 Arb. Int'l 274 (1986).

The court below, however, followed its prior precedent holding that *foreign* arbitrators are entitled to greater deference in interpreting United States public policy than are *domestic* arbitrators. 2a-3a (citing *Europcar*, 156 F.3d at 316, and *Parsons*, 508 F.2d at 974); *see also Kashani v. Tsann Kuen China Enter. Co.*, 118 Cal. App. 4th 531, 554-56, 13 Cal. Rptr. 3d 174, 191-92 (2d Dist. 2004) (distinguishing result below on basis that it applies only to arbitration under New York Convention). The Second Circuit first articulated

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(footnote continued)
services in connection with leasing to Iran that Russo was "ready, willing and able" to perform from 1996 to 2002, though Aeroflot had ceased allowing Russo to perform those services. 27a, 32a-34a. The disputed issues in the courts below were pure questions of law: whether the services for which the arbitrators awarded Russo compensation under the contract were illegal as a matter of U.S. federal law, and whether as a result the award is unenforceable as a matter of law under the New York Convention.

this theory in the *Parsons* case, holding that "[e]nforcement of *foreign* arbitral awards may be denied on this basis [the public-policy defense under the New York Convention] only where enforcement would violate the forum state's most basic notions of morality and justice." *Parsons*, 508 F.2d at 974 (emphasis added).

Applying this rule, the Second Circuit in the present case decided that it need not resolve the issue of whether the contract was illegal or violated public policy. 2a-3a. Rather, the court below concluded that it could uphold the award as long as it was "doubtful" whether a public-policy violation existed. 3a. The Second Circuit's rule of deference to arbitrators on the public-policy issue in the international context is directly opposed to this Court's holdings in the domestic context, which mandate that if a contract, as interpreted by an arbitral panel, "violates some explicit public policy, [courts] are *obliged* to refrain from enforcing it." *Grace*, 461 U.S. at 766 (emphasis added). Had the Second Circuit independently examined the issue as it was obliged to do, it would have recognized that the Consultation Agreement violated the ITRs, both as adopted in 1995[5] and as amended in 1997.[6]

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[5] The 1995 regulations prohibited not only imports from and exports to Iran, *see* 31 C.F.R. §§ 560.201, 560.204 (1996 ed.), but also "any transaction ... by a United States person *relating* to goods or services of Iranian origin," *id.* § 560.206. Consultation services in connection with the leasing of aircraft to Iran for *commercial airline services in Iran* plainly "relat[e] to" services of Iranian origin, *id.*, which are defined to include "[s]ervices performed in Iran," *id.* § 560.306(a)(3).

[6] The 1997 executive order and implementing regulations were intended to "consolidat[e] and clarif[y]" the existing prohibitions. Continuation of the National Emergency with Respect to Iran, 69 Fed. Reg. 12,051, 12,051 (Mar. 10, 2004). Among other things, the 1997 amendments clarified that prohibited "transaction[s] or dealing[s]" in-

(footnote continued)

The Second Circuit's deferential approach fails to appreciate that the public-policy defense is no different in the arbitration context than in any other context. As this Court has remarked, the public-policy defense to enforcement of an arbitration award is "a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act." *Misco*, 484 U.S. at 42 (citations omitted). Thus, in applying the public-policy defense to enforcement of an arbitral award, a court "must treat the arbitrator's award as if it represented an agreement between [the parties] as to the proper meaning of the contract's words," and "decide whether [the] contractual ... requirement would fall within the legal exception that makes unenforceable a[n] ... agreement that is contrary to public policy." *Eastern Assoc. Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62 (2000) (internal quotation marks omitted).

This Court has made clear that "arbitration agreements [are] as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added). This Court has also recognized that in the international context, no less than the

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(footnote continued)
clude "facilitating" transactions by third-country nationals with Iran. *See* 31 C.F.R. § 560.206(b); *see also id.* § 560.208. The court below did not question that the Consultation Agreement violated this provision, but speculated that the parties could have amended the Consultation Agreement to eliminate this illegality. *See* 3a. That would, however, have required replacing the contract, the sole purpose of which was to facilitate the supply of aircraft to Iran, *see* 21a, 24a, with a completely different contract.

domestic context, an agreement to arbitrate is a contract and stands "upon the same footing as other contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974). The decision below disregards this fundamental principle, by conferring on a foreign panel of private arbitrators the power to validate a contract that the parties themselves were powerless to validate.

B. The Decision Below Is Contrary to the Language of the New York Convention and the Practice of the Other Contracting States.

By the text of the New York Convention, public policy is a *defense to enforcement* of an arbitral award. The Convention by its explicit terms provides that enforcement may be refused "if the competent authority in the country where recognition and enforcement is sought [here, the U.S. court] finds that ... [t]he recognition and enforcement of the award would be contrary to the public policy of that country [here, the U.S.]." New York Convention, Art. V(2)(b). Thus, the New York Convention makes clear that (1) the public-policy issue is to be determined by reference to domestic law in the country where enforcement is sought, and (2) the enforcing court is the appropriate body to determine the public-policy issue. By deferring to the arbitrators on the issue of whether their own award violates public policy, the court below ignored the Convention's command that the enforcing court should independently decide whether its own country's public policy was violated.

The Second Circuit's conclusion that a foreign panel of private arbitrators can validate an otherwise illegal contract ignores the very reason that the public policy defense was included in the New York Convention. The public policy defense in the Convention embodies the internationally recognized principle that a nation cannot allow its own courts to

enforce a contract that violates its own public policy. The courts of other signatories to the New York Convention have held that if the underlying contract as interpreted by the arbitrators violates public policy, then an award founded on the contract is unenforceable.[7] The Second Circuit and lower courts in this country following its precedents, however, have taken a contrary position.[8]

C. The Decision Below Confuses Laws Designed to Protect the Parties with Laws Designed to Protect the Interests of the State.

The court below stated that a violation of the ITRs in the circumstances of this case would not violate "fundamental public policy," citing to its decision in *Parsons*, which equates "public policy" with the "most basic notions of morality and justice." *Parsons*, 508 F.2d at 973-74. The *Parsons* decision, however, inappropriately adopts a standard that was

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[7] *See, e.g., Soleimany v. Soleimany*, [1999] Q.B. 785 (C.A. 1998) (Eng.) (holding that arbitral award was unenforceable under New York Convention where underlying contract was illegal); *Judgment of May 11, 1983*, 1983 Österreichische Juristenzeitung 519 (Oberster Gerichtshof [Supreme Court]) (Austria), *excerpted in* 10 Y.B. Commercial Arb. 421 (same); *Harris Adacom Corp. v. Perkom Sdn Bhd.* [1994] 3 Malayan L.J. 506 (Kuala Lumpur High Court Dec. 10, 1993) (Malaysia), *excerpted in* 22 Y.B. Commercial Arb. 753 (same).

[8] *See, e.g., Parsons*, 508 F.2d at 974 (constricting scope of public-policy defense in context of international arbitration); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 819-20 (D. Del. 1990) (following *Parsons*); *Antco Shipping Co. v. Sidermar S.p.A.*, 417 F. Supp. 207, 216-17 (S.D.N.Y. 1976) (holding, under *Parsons*, that arbitral award was enforceable under New York Convention even if underlying contract violated U.S. anti-boycott regulations); *Kashani*, 118 Cal. App. 4th at 554-56, 13 Cal. Rptr. 3d at 191-92 (distinguishing result below as being specific to arbitration under New York Convention).

developed in the context of principles designed to do justice between the parties,[9] and transplants it into the context of laws designed to protect the interests of the state. On its facts, *Parsons* was correctly decided because the contract in that case did not violate positive law, *see Parsons*, 508 F.2d at 974 n.5; but the "morality and justice" language misapplied in *Parsons* has taken on a life of its own, distorting the lower courts' understanding of the New York Convention's public policy defense, and leading to an erroneous result in this and other cases. *See, e.g.*, 2a-3a, 11a-12a, and cases cited *supra* note 8.

Internationally, it is well recognized that the public policy defense comes into play in two distinct circumstances: (1) where the arbitral award violates fundamental principles of "justice or morality" between the parties, and (2) where the arbitral award or the underlying contract violates laws "designed to serve the essential political, social or economic interests of the State." International Law Association ("ILA") Committee on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, in ILA, *Report of the Seventieth Conference Held in New Delhi* 6 (2002). The latter category includes "measures of embargo, blockade or boycott." *Id.* at 7. This widely recognized distinction between "fundamental" rules of justice as between the parties, and "*lois de police*" designed to protect the interests of the state, is basic to the understanding of the public policy defense under the New York Convention. *See id.* at 6; ILA Committee on

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[9] *See Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 201-02 (1918) (relied on by *Parsons*; holding that New York public policy did not forbid applying Massachusetts wrongful death statute to tort occurring in Massachusetts).

International Commercial Arbitration, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, in ILA, *Report of the Sixty-Ninth Conference Held in London* 17-21 (2000).

These two very different situations call for two very different standards. Where alleged unfairness between the parties is involved, courts have rightly insisted that the most fundamental principles of morality and justice truly be involved before enforcement will be refused. *See, e.g.*, *Europcar*, 156 F.3d at 315-16. Otherwise, the public-policy defense to enforcement of an arbitral award could become a vehicle for relitigation of the merits of contractual issues or for imposing United States law on foreign transactions. Moreover, where the only interests at stake are those of the parties to the arbitration, courts are rightly hesitant in entertaining a party's complaints about the unfairness of the forum it chose by contract.

But where the case implicates laws designed for the protection of the interests of the nation—such as the sanctions in place against Iran—the same concerns do not apply. Here, the President and the Secretary of the Treasury, exercising their authority pursuant to statute, have determined that the United States' public interest in combating terrorism and the proliferation of weapons of mass destruction warrants an *explicitly extraterritorial* ban on U.S. citizens' involvement with transactions with Iran. *See* 31 C.F.R. § 560.206 (applying prohibition to United States persons wherever located); *id.* § 560.314 (defining "United States person" to include any U.S. citizen, U.S. company, or person located in the U.S.). Given that the political branches have already spoken on this point, applying the public-policy defense in this case raises no concerns about unwarranted judicial extension of U.S. law to foreign transactions. Moreover, the ITRs were designed to

protect the interests of the United States and the public at large, who did not consent to have their interests determined by a privately selected foreign panel of arbitrators.

Furthermore, it is inappropriate for the courts to evaluate the importance of the public-policy goals that the ITRs were intended to serve. Here, performance of the contract would violate specific and serious legal prohibitions enacted by the legislative and executive branches, which, according to the President, "advance important objectives in furthering the nonproliferation and anti-terrorism policies of the United States." Periodic Report on the National Emergency with Respect to Iran, H.R. Doc. No. 108-47, at 4 (Mar. 13, 2003). A standard that requires the courts to second-guess the "morality and justice" of prohibitions enacted by Congress and the President undermines the ability of the political branches to speak with one voice in the sensitive area of foreign relations.

* * *

It is well established that a contract that violates positive law designed for the protection of the public interest is unenforceable as contrary to public policy. *See, e.g.*, *Eastern Assoc. Coal*, 531 U.S. at 61-62; *National Petrochemical*, 930 F.2d at 243. The court below failed to recognize that the New York Convention incorporates that principle in its public policy defense. *See* New York Convention, art. V(2)(b).

This Court should grant certiorari to address this important issue of law, and to bring the lower courts' New York Convention jurisprudence into line with this Court's domestic arbitration jurisprudence and the practice of this country's treaty partners.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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